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IN THE

Supreme Court of the United States

October Term, 1961

No. 775

ADOLPHUS HOHENSEE,
Petitioner,

v.

WILLIAM K. BLETHEN, et al.,
and
STUART K. NIELSEN,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE RESPONDENT OPPOSING CERTIORARI

MAURICE KADISH
1807-9 Smith Tower
Seattle 4, Washington
Counsel for Respondent Opposing Certiorari

METROPOLITAN PRESS AND WESTERN

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CORRECTED STATEMENT

Petitioner originally engaged W. H. Morris of Wichita, Kansas, as his national counsel to sue for libel against various parties, J. P. Tonkeff, attorney of Yakima, Washington, as trial counsel, and respondent, Stuart K. Nielsen, as local counsel for a libel action against William K. Blethen, et al., at Seattle, Washington.

The action was commenced in the Superior Court of the State of Washington for King County. The defendants in the suit removed it to the U. S. District Court. By agreement of petitioner and all his counsel, the suit on motion and after hearing was remanded.

The defendants gave notice of the taking of petitioner's deposition in Seattle. Respondent opposed such depositions as not being proper under state court rules and decisions, claiming petitioner could not be forced to appear in this manner away from his residence.

The court disagreed with such objections and respondent was only able to obtain a delay as to the time of the deposition. Thereupon respondent informed petitioner of such adverse decision and advised an appeal from the order. Petitioner did not desire an appeal and proposed a convenient date for him to be present at the deposition. Such a date was arranged.

Petitioner requested respondent to arrange for depositions of certain defendants for the same time and place. This was done.

At the discovery deposition, petitioner refused to answer many questions propounded to him, that respondent advised him he was required to answer under State Court Discovery Rule 26.

Petitioner became angry with respondent and discharged him as his attorney and refused to cooperate further in the proceedings.

Defendants cited petitioner into court under the rules for failure to answer questions properly propounded at the deposition and requested penalties by way of costs and attorney fees.

Respondent, discharged, but still the only attorney of record, advised petitioner of such proceedings and petitioned the court to establish the amount of his lien for services upon such discharge and to permit petitioner to

substitute other counsel.

Citation of petitioner was duly made to respondent's petition. Petitioner made answer thereto, admitting the discharge of respondent, claimed misconduct by respondent, asked permission to substitute other counsel, and submitted the matter to the court.

Based upon the answer of the petitioner, and evidence, the court thereupon on April 22, 1959, established the amount of respondent's lien for services and costs in the amount of $1530.00, entered judgment therefor and permitted petitioner to make substitution of other counsel.

No appeal was ever taken from this judgment.

Prior to this time petitioner had discharged both W. H. Morris and J. P. Tonkoff and has since appeared as his own attorney.

On May 29, 1959, petitioner filed a motion to vacate said judgment. No citation was ever issued or requested to bring this matter on for hearing.

On February 17, 1961, respondent moved to dismiss petitioner's motion to vacate for failure to prosecute for more than one year, as provided by court Pleading Rule No. 41.04W. Notice of hearing was mailed to petitioner with hearing set for March 10, 1961.

Petitioner filed a brief opposing said motion, and submitted said motion without oral argument. No reason having been submitted by petitioner that would cause Rule 41.04W not to apply, the court entered its order dismissing petitioner's motion to vacate the judgment.

Petitioner gave notice of appeal to the Supreme Court

of the State of Washington.

In October, after the filing of petitioner's brief on appeal, respondent moved to strike and to dismiss the appeal, under Rule 8, upon the grounds that (1) Petitioner's transcript failed to show the jurisdictional fact of notice of appeal, timely made; (2) The brief failed to state any appealable assignment of error, as provided by Rule 43, Rules on Appeal; (3) The appeal was made solely for delay.

Notice of hearing was given to petitioner. He failed to appear at the hearing in person or by counsel. At the time of said hearing, petitioner had failed to file with the State Supreme Court the transcript of the record on appeal, as required by Appeal Rule 44. Such transcript was received by the clerk prior to the entry of the court order dismissing said appeal.

From such proceedings, petitioner seeks his writ.

REASONS FOR DENYING THE WRIT

Petitioner Argues: (1) That notice of appeal from the judgment of April 22, 1959, given April 5, 1961, was timely; and (2) That the Superior Court never obtained jurisdiction of petitioner, so the judgment is void.

I

Petitioner incorrectly assumes the rules of the courts of the State of Washington are the same as Rule 52(b) of the U. S. District Courts. Thereunder, a motion to amend findings or judgment filed within ten days of the judgment, stays the commencing of the time for an appeal until such motion is acted upon. The cases cited are based upon such rule.

The Revised Code of Washington 4.76.060 provides a motion for new trial must be served and filed within two days of the entry of judgment. This is the only proceeding that stays the running of the thirty days in which an appeal must be commenced by serving and filing notice of appeal, in order to give the Washington State Supreme Court jurisdiction of an appeal, Appeal Rules Nos. 32 and 33. *Yand's Estate*, 23 Wn.(2d) 831, 162 P.(2d) 434 (1945).

Petitioner's motion to vacate was not filed until after thirty days from the entry of judgment. It was neither timely as an appeal, nor motion for new trial. It was a proceeding under Rule 60.04W, Rules of Pleading, Practice and Procedure.

This rule requires an affidavit showing grounds not available at the time of entry of judgment, and does not take the place of an appeal. It requires an order fixing the time and place of hearing to be prepared and presented by the moving party, Rule 54.04W. It must be served as summons in an original action. None of these requirements were complied with.

II

The Superior Court did have jurisdiction to enter the judgment.

Petitioner was the plaintiff in the action and submitted himself to the jurisdiction of the court for all purposes connected with the lawsuit.

Respondent was attorney of record for petitioner. Upon his discharge the court had jurisdiction to establish his lien for services and costs. RCW 2.44.040. RCW 60.40.010.

RCW 60.40.030. The petitioner appeared in answer to the citation therefor, filed his answer, admitting the discharge, made libelous charges against respondent, asked permission to substitute other counsel, and submitted the matter to the court for decision without his personal presence. He cannot complain of the decision he sought discharging his attorney and the consequent decision as to rights of that attorney as to his lien and to be paid for his services and expenses.

This right has been well established.

State v. Moore, 34 Wn.(2d) 351, 208 P.(2d) 1207 (1949);

Payette v. Willis, 23 Wash. 299, 63 Pac. 254 (1900);

Jamlin v. Case, 188 Wash. 150, 61 P.(2d) 1287 (1936);

Schultheis v. Nash, 27 Wash. 250, 67 Pac. 707 (1902).

All the Washington cases as to lack of jurisdiction of the person cited by petitioner are in original proceedings. This principal has no application herein.

The Federal case, *Griffin v. Griffin*, 327 U. S. 220, 90 L.ed. 640, cited, is contrary to petitioner's contention. It was a proceeding to establish the amount of alimony *arrears*. It mentions mere notice being required for further proceedings in an action in which the court had original jurisdiction of the parties. In the cited case it was not given. Petitioner had adequate notice and sought and obtained requested relief at the hearing.

III

The Judgment of the Supreme Court of the State of Washington was correct and no constitutional question is involved.

Rule 44 of the Rules of Appeal established by the Supreme Court provides for preparation of a transcript of the record necessary for the appeal at the expense of the appellant, and the filing of the same with the clerk of the Supreme Court within *three* months after notice of appeal.

The appeal was taken by notice April 5, 1961. The transcript had not been filed with the Supreme Court at the date of hearing of the motion to dismiss November 3, 1961. Such transcript failed to show filing of notice of appeal, a jurisdictional fact. No request was made to correct this defect.

Petitioner's brief filed on appeal did not raise any assignment of error concerning the judgment dismissing the motion to vacate from which the appeal was taken. There was, therefore, no matter before the court for consideration, the appeal had not been diligently prosecuted, and dismissal of the appeal was proper. Rule of Appeal 43, 8.

Petitioner's actual appeal was from a dismissal of his incomplete motion to vacate the judgment of April 22, 1959, filed by him May 29, 1959.

After a year had elapsed without action thereon by the petitioner, a dismissal was asked for want of prosecution under Rule 41.04W and for failure to give notice or set forth adequate grounds therefor under Rule 60.04W.

Rule 41.04W was held to apply to a motion to vacate judgment in *Goodwin* v. *Castleton*, 31 Wn.(2d) 701, 198 P.(2d) 678.

The order of dismissal was therefore lawful and proper.

CONCLUSIONS

Petitioner is very anxious to commence law suits, adept at drawing and filing legal papers, misstating facts and charging attorneys with incompetence and misconduct. All his troubles come from his failure to follow legal advice and procedures and in wanting his own way at any cost.

Without filing any bond, he considers he is entitled to a stay of enforcement of the judgment by merely signifying his intention to appeal or seek a writ.

It is apparent that this proceeding is without merit and is taken solely for delay and to make unjust charges against respondent. The writ should be denied and respondent should thereon be awarded his costs and damages within the discretion of the Court, as provided by Rules of the Supreme Court 56(4).

Respectfully submitted,

MAURICE KADISH

Counsel for Respondent Opposing Certiorari